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FRA - 2001-11068-5

DEPT. OF TRANSPORTATION

**Oral Statement of Don Watts, Director Regulatory Affairs representing
Canadian National Railway**

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February 14, 2002 - Washington D.C.

**Re: Docket Number FRA 2001-11068, Notice Number 1, 49 CFR Part 219, RIN 2130-AB39,
Control of Alcohol and Drug Use: Proposed Application of Random Testing and Other
Requirements to Employees of a Foreign Railroad Who are Based Outside the United States
and Perform Train or Dispatching Service in the United States; Request for Comments on
Even Broader Application of Rules and on Implementation Issues**

Good Morning. My name is Don Watts. I am Director of Regulatory Affairs for Canadian National Railways, located in Montreal, Quebec, Canada.

On behalf of Canadian National, I wish to provide you with our comments on the Notice of Proposed Rulemaking and Request for Comments as published in the December 11, 2001 Federal Register. I should mention that CN has also provided a detailed written submission that largely echos the views I will be expressing today.

Introduction

Canadian National is North America's fifth largest railroad.. It operates the largest rail network in Canada and the only transcontinental network in North America. CN has operations in eight Canadian provinces and 14 U.S. states. In 1999 CN carried out an extremely successful integration with Illinois Central, which included the consolidation of the drug and alcohol programs for all of our US operations. We are, of course currently implementing a similar integration with Wisconsin Central.

Safety is a core value at CN and the railroad has long been recognized as one of the safest railroads in North America. CN believes that an important part of an effective safety program is a drug and alcohol free workplace. As such, we are in favor of random drug and alcohol testing for safety critical positions on both sides of the border and have long

advocated common D&A testing regulation from Transport Canada and FRA. It is felt that such a measure will improve the overall safety of operations while reducing the inevitable human rights/jurisdictional challenges and related economic impact on the railroad associated with applying unilateral U.S regulation to Canadian-based employees.

Current Operations

There are currently nine locations where CN Canadian-based trains crews operate into the U.S. These range from 1 mile to 77.7 miles and include operations over a total 204 miles of track. Specific operations are :

- Border to St. Albans, Vermont (18.7 miles)
- Border to Rouses Point, NY (1.2 miles)
- Border to Massena, NY (22.3 miles)
- Border to Buffalo, NY (7.6 miles to CSXT Frontier, 12.9 miles to SBRR Seneca, 10.5 miles to NS Tifft, or 19 miles to NS CPGJ, 27.3 miles to NS CP-Gravity)
- Border to Niagara Falls, NY (5.8 miles to CP22)
- Border to Port Huron, Michigan (1 mile to Port Huron or 77.7 miles to Flat Rock Yard)
- Border to Ranier, Minnesota (1 mile)
- Border to Noyes, Minnesota (1 mile)
- Sprague subdivision (43.8 miles across northern Minnesota from International Boundary to Baudette)

CN Canadian Drug and Alcohol Policy and Program

Although drug and alcohol testing is not legislated in Canada, CN has been conducting testing under company policy since 1986. In 1997, as part of a major overhaul of its safety programs, CN implemented a comprehensive drug and alcohol policy and program for its Canadian operations. This consolidated a number of existing programs to provide an extensive and clearly defined program and includes testing for:

- Pre-employment for specified risk-sensitive positions (drug only)
- Pre-assignment to a risk sensitive position
- Reasonable Cause

- Return to service/follow-up (post-treatment)

Revisions to the policy planned for 2002 will add mandatory post-accident testing using criteria identical to that of the FRA.

CN's Canadian drug and alcohol program also provides for employee self referral and co-worker report programs similar to those which would be required under the expanded scope of 49 CFR Part 219 proposed in the NPRM.

Of significance, however, is that the CN policy for Canadian operations does not include random testing. This is entirely due to the Canadian legal climate and specifically the Canadian Human Rights Act, which has in the past, ruled that company mandated random drug testing is prohibited, even for safety-sensitive positions. Furthermore, random drug testing has been historically prohibited under Canadian railway labour arbitration jurisprudence. Although this may have been somewhat modified by a recent Ontario Court of Appeals decision, it has not been tested in the railway context and there remains considerable uncertainty regarding the legal status of random drug and alcohol testing in Canada.

Past CN -FRA Involvement

As recently as 1999, CN hosted representatives from FRA and Transport Canada to discuss CN's drug and alcohol policy and associated programs for Canadian-based employees. At that time, we explained in great detail the Canadian regulatory history with regards to drug and alcohol testing as well as all aspects of the CN policy.

We emphasized that the existing combination of FRA testing requirements and the lack of Canadian legislation has led to uncertainty and ambiguity that have resulted in increased costs for the railroad industry and labor. It has also created a situation where employees often receive contradictory instructions from railroad companies and the unions.

CN concluded the 1999 session by stating that, while the policy has made a difference, CN strongly believes that there is still the need for random testing for all safety critical employees in our Canadian operations. We added, however, that under the current Canadian human rights legislation, expanding random testing to Canada can best be done if Transport Canada enact similar legislation to that in place under FRA in the United States. Clearly this remains our position

As such, CN generally supports the expansion of random testing as contained in the NPRM, but is extremely concerned that it will be difficult and potentially very costly to successfully implement within the boundaries of Canadian human rights legislation unless accompanied by comparable legislation from Transport Canada for all safety critical positions in Canada.

FRA has been aware of the dilemma arising from the inconsistency with Canadian law for a number of years. Since 1989 there have been a series of delays in implementing the random testing aspects of Part 219 for foreign-based employees so as to allow for discussions with Canadian regulatory agencies. It is our understanding that similar discussions have most recently been held between FRA and Transport Canada as part of the Canada/US Land Transportation Standards Subcommittee under NAFTA.

CN Concerns and Recommendation

Due to the nature of train crew collective agreements and railroad operations, for CN to implement random testing for those "covered" employees who operate into the US, the Railroad will need to create a random pool which includes many employees who are subject to, but may never actually operate into the US. This will undoubtedly create problems under Canadian Human Rights legislation. Although human rights decisions pertaining to similar drug testing requirements for cross-border truck and bus drivers have helped clarify the situation somewhat, it remains that, without comparable Canadian legislation, CN would be in the extremely difficult position of having to balance the requirements necessary to fully comply with the FRA regulation against the very strict requirements which will be needed to satisfy the Canadian Human Rights Commission.

It would also lead to the possibility of Canadian train crews refusing to be tested and having to be taken out of service, thus potentially tying up cross-border traffic and international trade. In many of the CN operations involving Canadian-based crews, there may not be sufficient infrastructure or resources to support alternatives using US-based crews.

In any event, CN will undoubtedly be forced to incur considerable expense in defending human rights challenges. This problem will be even more acute with respect to Canadian-based train dispatchers who do not physically set foot in the United States and therefore could claim protection under international law as it pertains to extent of jurisdiction.

For these reasons, CN supports the general intent of expanding random testing but strongly urges FRA to continue to work with their Canadian counterparts in developing common drug and alcohol legislation. Such would greatly reduce potential costs and human rights/jurisdictional challenges while improving the safety of operations. It would also be consistent with the goals of NAFTA and the Canada/US Land Transportation Standards Subcommittee.

Other Comments

In our formal written submission CN also makes detailed comments on a number of specific items in the NPRM and the supporting economic analysis. I will not repeat them all in my statement today however I do wish to focus on a couple of the items including those for which FRA has specifically solicited comments.

Extraterritorial dispatching – In the NPRM, FRA requests comments on the possible expansion of Part 219 to foreign based dispatchers who control track located in the U.S.

As previously stated, CN supports the general concept of random testing for train dispatchers. As previously noted, however, it is also our view that application of such a requirement for employees who do not actually set foot in the US will be extremely contentious from both the standpoint of human rights and territorial jurisdiction under

international law. As such, we believe that this specific issue must be discussed in great depth with Transport Canada and we would strongly recommend that the two agencies resolve the matter through the application of common drug and alcohol testing requirement for train dispatchers.

We also note that, despite the comment in the NPRM suggesting that train dispatchers would remain exempt from the full provisions of Part 219, there does not appear to be any specific wording in the actual regulation to accommodate this.

Handling of Foreign-based Signal Maintainers – FRA also asks for comments concerning the expansion of Part 219 to foreign-based signal maintainers who may be required to perform work in the U.S.

CN wishes to advise that the use of its Canadian-based signal maintainers to maintain signal systems in the US is very occasional and, in fact, even less than that started in the NPRM. CN only has signal maintainers located in southern Ontario who occasionally are required to work in the US in the Buffalo NY (Black Rock) area. As such, CN agrees that these employees should remain exempt from the requirements of Section 219. To this point, we also note that such positions would not be considered as “safety critical” under the Canadian Railway Safety Act and thus would not be subject to Canadian drug testing regulation, even if adopted. CN will continue to apply all testing aspects of its Canadian Drug and Alcohol policy to these employees.

Expansion of Post-Accident testing – In the NPRM, FRA request comments on expanding the requirements for post-accident testing to include FRFB train employees who are involved in an otherwise qualifying event while in transit to or from the U.S.

Although CN supports post-accident testing, it is our view that such an expansion will be very difficult to defend from the standpoint of international law and territorial jurisdiction. In the case of fatalities, there could also be significant jurisdictional issues

pertaining to FRA requirements for handling of tissue specimens and Canadian Provincial Coroner's powers.

As previously mentioned, CN is expanding its Canadian drug and alcohol testing policy to include post-accident testing using FRA criteria. It is our view that this will adequately address this issue.

Issues pertaining to laboratories and testing equipment – FRA also asks for comments on whether there would likely be problems with the shipping of specimens from Canada to FRA designated post-accident laboratories in the US when additional testing beyond that in part 40 is deemed necessary.

In reviewing this issue, CN acknowledges that there could very well be delays in shipping due to customs issues, etc. It is therefore suggested that the most effective means of addressing these issues would be to certify one or more Canadian laboratories to be able to perform the required analysis. This should not be difficult in light of the high level of technical sophistication at many Canadian labs

Regulatory Impact - I would also like to comment on a couple of issues and concerns that we have with regards to the Regulatory Evaluation and associated economic impact evaluation prepared by FRA.

The FRA's economic evaluation is based on a total of 170 Canadian-based train crew employees operating into the U.S. Although we do not have data for the other affected Canadian railways, CN has identified approx. 140 Canadian-based train crew employees at CN alone that are in pools that regularly operate into the US. Adding those spareboard employees that can occasionally work in the US, the overall number for CN would be in the order of 400. In either case, the number used by FRA to develop the cost of the proposed rule would seem to be considerably underestimated.

In the same section FRA also suggests that "as a result of the requirements of the proposed rule, foreign railroads may decrease the number of train employees that operate in the United States to the minimum number required to perform the operations, under ideal conditions, and accept the risk of delay associated with not having some reserve engineers and other train crew members available." CN strongly believes that this would not be a viable option. Our customers demand on-time service and we have been able to succeed by providing this level of service. CN's much-documented scheduled railroad and associated asset utilization philosophies are based on providing consistent performance. Clearly we cannot accept a risk of delay due to not having sufficient train crews cleared for operation in the U.S.

An inaccuracy with regards to pre-employment testing is noted in Section 11 of the document, which states in part, "Only one (Canadian) carrier is currently performing pre-employment drug testing." Although FRA does not indicate which carrier they are referring to, the statement is incorrect as CN is aware of at least two Canadian railroads (CN and CP) that conduct pre-employment testing.

In the section of the document dealing with "Identification of Troubled Employees" FRA states that employees who either refer themselves or are reported by co-workers will take a leave of absence to receive treatment, and once rehabilitated, will return to service on the recommendation of a SAP. It should be noted that, for Canadian-based employees, under Canadian regulations the railroad's Chief Medical Officer would also have to approve any return to service. As such and due to minor differences between CN's peer reporting program and FRA requirements, it is also likely that, contrary to the assumption made in the economic document, we would have to file an alternate policy.

We also believe that a number of the cost components associated with the new requirements would seem to be significantly understated. For instance, at one point FRA estimates that the development and submission of a test program, as required under Part 219, would take only 1 hour. This would seem to be an extremely optimistic estimate. CN suggests that it would most likely take in the order of 8 - 24 hours to complete.

We also note that the analysis does not account for a number of additional costs that would be incurred by railroads such as CN. For instance, under Canadian law, drug or alcohol disorders are deemed to be disabilities. As such, a Canadian railroad must accommodate such employees to the extent possible. This will add additional cost to the railroads. In addition, the combination of FRA regulations and Canadian Railway Medical Rule requirements would add an additional cost when Canadian-based crews test positive for FRA required drug or alcohol tests. As previously mentioned, under Canadian regulations, the railroad's Chief Medical Officer has the ultimate decision with regards to fitness for duty. Thus, in addition to the requirements associated with the SAP under FRA regulation, Canadian railroads would have the additional cost associated with CMO review of the fitness for duty of all employees who either test positive or are diagnosed as having a substance abuse disorder.

With respect to costs associated with employees on Leave of Absence, CN notes that under the Railroad's benefits program, CN may be required to pay sick leave benefits to such employees. CN would also be required to pay part of the rehabilitation costs. Both of these would be costs in addition to those estimated by FRA.

Of most significance, however, with respect to the estimated costs to Canadian railroads as contained in the NPRM and economic evaluation is the complete omission of any mention of the costs that CN and other affected Canadian railroads will undoubtedly be forced to incur in defending humans rights challenges unless comparable Transport Canada regulation is enacted. Similarly there is no reference to potential costs associated with train delays, operations changes or cross-border trade disruptions due to refusals to submit to random testing. As previously noted these are, by far, the major concerns that we have with the proposed rule.

Summary

In conclusion, CN generally supports the expansion of random drug and alcohol testing for safety-critical employees on both sides of the border but strongly urges FRA to

continue to work with their Canadian counterparts to develop a common drug and alcohol regulation for railroad operations in the two countries. It is felt that such a measure will reduce the inevitable human rights/jurisdictional challenges and related economic impact on the railroad associated with applying U.S regulation to Canadian-based employees while improving the overall safety of operations and furthering the goals of NAFTA and the Canada/US Land Transportation Standards Subcommittee.

Thank you very much for providing us with the opportunity to bring forth these comments and concerns.

Canadian Based Train Crews Operating Into US

From	To	Distance (miles one way)	Routing/Track Owner	Trains/day	No. Affected Employees
Quebec border	St. Albans, VT	18.7	NECR (Swanton sub)	1 each dir	4 plus 24 on spareboard
Quebec border	Rouses Point, NY	1.2	CN (Rouses Pt sub)	as reqd. Infrequent and seasonal - 20 per year	Would use spareboard as above
Quebec border	Massena, NY	22.3	CSXT (Conrail Montreal sub)	1 each dir	6 plus same spareboard as above
Fort Erie, Ont	Buffalo, NY (CSXT Frontier)	7.6	CN Stamford sub, CSXT Niagara branch, Belt Line Branch, Chicago Line	2 each way	10 plus 25 on spareboard
Fort Erie, Ont	Buffalo, NY (SBRR Seneca)	12.9	CN Stamford sub, CSXT Niagara branch, Belt Line Branch, Chicago Line, SBRR yard	6 per week each dir	5 plus same spareboard
Fort Erie, Ont	Buffalo, NY (NS Tifft)	10.5	CN Stamford sub, CSXT Niagara branch, Belt Line Branch, Chicago Line, NS	1 each way (lite engine into US)	5 plus same spareboard
Fort Erie, Ont	Buffalo, NY (NS CPGJ)	19	CN Stamford sub, CSXT Niagara branch, Belt Line Branch, Chicago Line, NS Buffalo Line	1/day out	4 plus same spareboard
Fort Erie, Ont	Buffalo, NY (NS CP Gravity)	27.3	CN Stamford sub, CSXT Niagara branch, Belt Line Branch, Chicago Line, NS Buffalo Line	1/day into	4 plus same spareboard
Niagara Falls, Ont	Niagara Falls, NY (CP22)	5.8	CN Grimsby, CSXT Niagara	1/day	4 plus same spareboard
Sarnia, Ont	Port Huron, MI	1	CN Strathroy	11/day into Pt.Huron (incl. one 3 man puller). Does not include 2 VIA trains	44 plus 136 spareboard
Sarnia, Ont	Detroit (Flat Rock Yd) via Port Huron	77.7	CN (Strathroy sub, GTW Flint, Mt. Clemens, Shore Line and Flat Rock)	1 each way	4 plus spareboard as above
Fort Frances, Ont	Ranier MN	1	CN (DWP- Rainy sub)	5 each way plus 1 switcher 5 days per week	Same as Sprague sub
Emerson, Man	Noyes, MN	1	BNSF	6 per week	5 plus spareboard as Sprague
Baudette, MN	International Boundary, MN	43.8	CN Sprague sub	8 each direction	47 plus 53 spareboard
		249.8			
					142 plus 238 spareboard